used, but it may become dangerous if carelessly used. The same will apply to an automobile: though it be properly constructed, if negligently driven it becomes imminently dangerous. If a gun is defectively constructed, it is imminently dangerous in the hands of a careful user. Likewise, an automobile, if defectively constructed, is an imminently dangerous article, even in the hands of a careful driver. No distinction can be drawn between them.[15] A distinction may be made between carriages and wagons, and motor driven vehicles as regards the constant strain; but even as to the former, it seems that it would correctly be classed as such a dangerous article, if defectively constructed, as to warrant liability to third persons for an injury resulting from the negligent construction. Of course, in determining the liability in each particular case, the proximity and remoteness must be considered. If there is negligence in the face of danger which can be reasonably foreseen, a liability should follow.[16] The policy of the law demands a fixed responsibility for the protection and safety of human life, and cannot suffer one to conduct himself in such a negligent way as to place life in danger, without incurring any liability. Cases of this kind deserve a liberal construction, and most of the authorities do not seem to hesitate to extend the doctrine whenever reason and justice require it.

RIGHTS OF THE CREDITORS OF A CORPORATION THE ENTIRE ASSETS OF WHICH HAVE BEEN TRANSFERRED TO ANOTHER CORPORATION. —Consolidation is a generic term, and is frequently used to include within its scope many transactions varient greatly in their legal results. A merger of corporations is often confused with consolidation. Though the two classes of transactions are in many respects similar yet they differ greatly in the legal consequences flowing from them. Used in its strictest sense, a consolidation of corporations implies a corporate union of two or more existing corporations, so that for practical purposes the old corporations cease to exist and a new and distinct legal entity is formed.[1] A merger of corporations, on the other hand, occurs where an existing corporation absorbs within itself the other constituent corporations.[2] The usual mode of effecting both consolidation and merger is for the absorbing company to issue its stock to the shareholders of the constituent companies in exchange for their stock in those companies. In which event, if the effect be a consolidation, the stockholders of the con-

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[15] See, for discussion, note to Cadillac Motor Car Co. *v.* Johnson, L. R. A. 1915E, 287.

[16] MacPherson *v.* Buick Motor Car Co. (N. Y.), 111 N. E. 1050 (instant case); Olds Motor Works *v.* Schaffer, *supra.*

[1] Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301; Morrison *v.* American Snuff Co., 79 Miss. 330, 30 South. 723, 89 Am. St. Rep. 598; Railroad Co. *v.* Georgia, 98 U. S. 359.

[2] Central R. & B. Co. *v.* Georgia, 92 U. S. 665. The distinction between consolidation and merger is well brought out in Vicksburg & Yazoo City Tel. Co. *v.* Citizens' Telephone Co., 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656.

solidating companies become shareholders in the consolidated company, which exists and operates under a new and distinct charter.[3] But if the result of the transaction is to merge one or more corporations into an existing corporation, the stockholders of the absorbed companies, in exchange for their shares, receive stock in the absorbing company and acquire the rights of the stockholders of that company, whose status is unchanged by the transaction.[4] Both in consolidation and merger, for in this respect the two are similar, the absorbing corporation acquires the rights, privileges, property, and franchises of the constituent companies, and the latter cease to exist as legal entities, unless preserved by statute for special purposes. In either case, it follows as a necessary incident that the absorbing corporation assumes the liability, both tort and contractual, of the constituent companies.[5]

It also frequently occurs that a sale by one corporation of its property and franchises to another is confused with merger, and particularly where the consideration for the transfer is the issuance of the stock of the purchasing company to the selling company. Such a transaction between corporations does not differ materially from a similar transaction between individuals. The corporate existence of the vendor is in no way affected by the sale; nor, in the absence of fraud, are the creditors of the selling corporation deemed in law to be injured thereby, since the corporation has merely changed the form of its assets.[6] Where a consolidation or a merger

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[3] Railroad Co. *v.* Georgia, *supra.*

[4] Central R. & B. Co. *v.* Georgia, *supra.*

The differences in legal effect which flow from consolidation and merger respectively are well illustrated by two Georgia cases. In the one case, two corporations, under their original charters subject to a limited taxation, where consolidated, and the attempt was made to impose upon the consolidated corporation an increased tax. It was held that inasmuch as a new corporation had been formed under a new charter, the exemptions from taxation possessed by the constituent companies did not extend to the consolidated corporation, and conseqently it was subject to any tax the state might lawfully impose. Railroad Co. *v.* Georgia, *supra.*

In the second case, a merger of two corporations was effected, both to operate under the charter of the first. The absorbing corporation, under its charter was exempted from taxation above a certain rate, but the absorbed corporation had no such exemption. Under authority of a subsequent statute, an attempt was made to tax the absorbing corporation at an increased rate upon the ground that a new corporation had been formed and the charters of the old surrendered. It was held that the property of the absorbing corporation which was exempt before the merger was not subject to the additional tax; but that the property of the absorbed company, never having been exempt in any way from taxation before the merger, was subject to the additional tax. Central R. & B. Co. *v.* Georgia, *supra.*

[5] New Bedford R. Co. *v.* Old Colony R. Co., 120 Mass. 397; The Chicago, Rock Island & Pacific R. Co. *v.* Moffitt, 75 Ill. 524; Indianapolis C. & L. R. Co. *v.* Jones, 29 Ind. 465, 95 Am. Dec. 654; Thompson *v.* Abbott, 61 Mo. 176; Tompkins *v.* Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992.

[6] Hawkins *v.* Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82; Chesapeake, Ohio & S. W. R. Co. *v.* Griest, 85 Ky. 619, 4 S. W. 323.

takes place, the constituent corporations lose their individual corporate existence, and are no longer capable of owning or acquiring property. Consequently, it would be impossible for these companies to receive any consideration, which is an essential element of a sale, for the transfer of their assets to the absorbing company. In the absence of constitutional or statutory restriction, a corporation which has no public duties to perform has, with the consent of its stockholders, the same power as an individual to sell its property and franchises, with the exception of its franchise to be a corporation.[7] And, in the absence of any element of fraud, the vendee does not become liable for the torts or contractual obligations of the vendor. The fact that a new corporation is organized by the directors and stockholders of the old for the express purpose of acquiring the business and assets of the latter is not of itself fraudulent as to the creditors of the old company.[8] It is often the case that an insolvent corporation is forced to go into liquidation, and the individuals who compose it, in their desire to save as much as possible from the wreck, organize a new corporation for the purpose of buying such of the property of the old as may be desirable. If the property is lawfully acquired, the creditors of the old corporation are in no way injured; and if the property is unlawfully acquired, the creditors have the same right that they would have against any other person unlawfully acquiring property of an insolvent debtor. The question depends very largely upon the motive which inspired the formation of the new company, and the subsequent acquisition of the property of the old.

It is a well established principle that if a corporation with intent to delay or defraud its creditors, or without consideration, transfers its property to an individual or to another corporation, existing creditors may sue in equity, after exhausting their remedies at law, to subject the property to the satisfaction of their debts.[9] The case frequently arises where the stockholders of a corporation organize a new company in which they are the principal shareholders and cause the property, franchises, and business of the old company to be transferred to the new for an inadequate consideration. Under such circumstances, it is clear that the new corporation is in effect but a continuation of the old. The courts, looking to the substance

[7] Dupee *v.* Boston Water Power Co., 114 Mass. 37. See Chesapeake, Ohio & S. W. R. Co. *v.* Griest, *supra;* Swing *v.* Empire Lumber Co., 105 Minn. 356, 117 N. W. 467. In this connection it is well to note that franchises are of two characters: one, a primary franchise, gives the right and authority to exist as a corporation, and it cannot be disposed of in the absence of statutory authority; the other, a secondary franchise, pertains to the different rights, privileges, and powers which are acquired through its charter. The secondary franchise is in no way a prerequisite to corporate existence, and in the absence of statutory restriction may be sold.

[8] Armour *v.* E. Bement's Sons, 123 Fed. 56; Austin *v.* Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444.

[9] Hibernia Insurance Co. *v.* St. Louis & New Orleans Trans. Co., 13 Fed. 516; Iron, etc., Co. *v.* Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26; Cole *v.* Millerton Iron Co., 133 N. Y. 164, 28 Am. St. Rep. 615.

of the transaction rather than to its form, have held that the new corporation impliedly assumes the obligations of the old, and that the creditors of the transferrer company may pursue the assets of their debtor into the hands of the new corporation, without having first obtained a judgment at law.[10] Consonant with this principle, in a recent case where a corporation controlled by persons owning the controlling interest in another corporation, having incurred liability for a tort, transferred its assets to the second company for an inadequate consideration, the transferrer as well as the transferee was held liable for the tort, upon the ground that the one was but a continuation of the other. *Wolff* v. *Shreveport Gas, Electric Light and Power Co.* (La.), 70 South. 789. Since the two corporations are in law separate and distinct, operating under different charters and having individual duties and liabilities imposed upon them, it would seem that the better and more accurate ground of liability is the fraud perpetrated upon the creditors in unlawfully obtaining assets of the debtor corporation.[11] To this extent, it will be observed, the general rule has been extended so that a defrauded creditor may follow the assets of his debtor without first obtaining a judgment at law.

Another case of fraud arises where a corporation having outstanding liabilities sells its property and franchises in consideration of shares of stock of the purchasing company transferred to its individual shareholders. Such a transaction amounts to a disbursement of the assets of the corporation, and no principle is better recognized than that a corporation can not directly or indirectly distribute its assets among its stockholders without first providing for its creditors.[12] Under such circumstances, the succeeding corporation has been held liable to the creditors of the transferrer company on the ground that the corporate assets are a trust fund for the benefit of creditors; but, independently of the trust fund theory, the succeeding corporation would be liable because of the gross fraud perpetrated upon the creditors of the old company.

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[10] See Blanc *v.* Paymaster Mining Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Higgins *v.* California Petroleum & Asphalt Co., 122 Cal. 373, 55 Pac. 155; Reed Bros. Co. *v.* First Nat. Bank, 46 Neb. 168, 64 N. W. 701.

[11] Hibernia Ins. Co. *v.* St. Louis & B. N. O. Trans. Co., *supra*.

[12] Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585, 19 Am. St. Rep. 663.